APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December, one thousand nine hundred and seventy-two.

Present: HON. IRVING R. KAUFMAN, HON. ROBERT P. ANDERSON, HON. JAMES L. OAKES, Circuit Judges.

Nos. 72-1497, 71-1716

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

MILTON SILVERMAN, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

/s/ A. DANIEL FUSARO
Clerk

(Seal)

Filed: December 11, 1972.

A true copy,
/s/ A. DANIEL FUSARO
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 71 Civ. 4997

(68 CR. 762)

MILTON SILVERMAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Opinion of Palmieri, J.
March 21, 1972

[2] PALMIERI, J.

This is a motion pursuant to 28 U.S.C. § 2255 to vacate a sentence and judgment of conviction. The claim of error upon which this collateral attack is predicated is that the proof at the trial had the effect of amending one count of the indictment (count 18) in contravention of petitioner's rights under the Fifth Amendment.[1]

Petitioner Silverman was convicted after a nine day jury trial of sixteen counts of an eighteen count indictment charging him with embezzlement of union funds and falsification of union books and records. That conviction was affirmed with respect to eight counts (namely, counts nine through fifteen and count eighteen), and reversed with respect to the first eight counts. *United States* v. *Silverman*, 430 F.2d 106 (2d Cir. 1970). The result of this disposition was to reduce the total fines from $16,000 to $8,000 but to leave the eight months' prison sentence unimpaired. Certiorari was denied by the Supreme Court on May 3, 1971. *Silverman* v. *United States*, 402 U.S. 953 (1971). A rehearing of that denial was also denied. 403 U.S. 924 (1971). Silverman began serving his sentence on June 8, 1971, after unsuccessfully attempting to secure stays from this court, the court of appeals, and from the Supreme Court.

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[1] No one shall be "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

He was released from the Federal Correctional Institution at Danbury, Connecticut, on December 21, 1971.[2]

[3] Milton Silverman was president of Local 810 of the International Brotherhood of Teamsters; the business manager of Local 1614 of the International Brotherhood of Electrical Workers and the administrator of the United Wire, Metal and Machine Health and Welfare Fund, as well as the administrator of the United Wire, Metal and Machine Pension Fund. Count eighteen, here challenged, charges:

> From on or about the 1st day of January, 1965 to on or about the 31st day of December, 1966, . . . the defendant, unlawfully, willfully and knowingly did cause false entries to be made in books, records, reports and statements . . . of a labor organization engaged in an industry affecting commerce . . . required to be kept by said labor organization pursuant to Title 29, United States Code, Section 436. (Title 29, United States Code, Section 439(c)) (Title 18, United States Code, Section).

Count eighteen refers to false entries made "[f]rom on or about the 1st of January 1965 to on or about the 31st day of December, 1966." Part of the Government's evidence at trial, introduced in rebuttal, indicated that alterations of minute books were made after March 3, 1967, a date beyond December 31, 1966. Silverman contends that this evidence constituted an impermissible amendment of the indictment. His argument is that this proof transformed count eighteen into a "generalized charge" that Silverman made false entries without regard to the time of making such entries.

The argument is simplistic and unpersuasive. The March 3, 1967 date came into the record, not on the Government's

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[2] This motion was filed during the period of incarceration and has not been mooted by Silverman's release. *Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

direct case, but through a surprising concatenation [4] of events at the trial and of which the Government could not have had prior notice. These events related to the testimony of a hostile witness, Jacob Friedland, an attorney, who asserted an attorney-client relationship both with Silverman and Local 810.[3] When his claim of privilege

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[3] This statement would appear to conflict with a statement in the opinion of the Second Circuit and an explanation is therefore in order. In United States v. Silverman, 430 F.2d 106, at 122, the court said, in its discussion of Silverman's claim on appeal that attorney Friedland's assertion of professional privilege had been incorrectly dealt with by the trial court:

> "Nor do we need to make a finding, which the trial court failed to make, as to whether Friedland was the attorney of Local 810 and not to Silverman, therefore leaving Silverman without standing to assert error in the ruling by the trial judge. 8 Wigmore, Evidence § 2321 (McNaughton Rev. Ed. 1961); McCormick, Evidence § 96 at 196 (1954)."

The plain implication of this statement is that the trial court neglected to concern itself with the identity of the client member of the asserted attorney-client relationship. This is without support in the record . The following appears from the trial transcript (at p. 609):

> "THE COURT: Mr. Friedland at the time of the transaction to which he is being questioned, was counsel for whom? The defendant Silverman or the unions?
>
> THE WITNESS (Friedland): The defendant and the unions both."

Further, at p. 611, the following appears:

> "MR. MALONEY (Assistant U.S. Attorney): The record before Judge Murphy, Court Exhibit 7, does reflect, as he has testified here, that for services to Local 810, he was paid; that Mr. Silverman retained him.
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> "With that record and the questions here we have to presume he was working for Locals 810 and 1614. This business of he was retained by Mr. Silverman as an individual was never raised before Judge Murphy and it's being raised for the first time here.
>
> "THE COURT: * * * I prefere not to make any finding. I will accept the testimony for the time being and pass on to something else."

The above portions of the record demonstrate that the trail court accepted Friedland's testimony regarding the nature of his at-

based upon this relationship was denied by the court, he asserted his Fifth Amendment privilege and declined to testify. Friedland was the Government's final witness on its direct case and thus far he had testified to nothing. The Government was forced to rest its case without his testimony. As the trial was about to end, however, he was recalled in rebuttal and given immunity from prosecution under 18 U.S.C. §§ 2514, 2516(i)(b) (Supp. IV, 1965-68). It was at this point in the trial that the March 3, 1967 date was first mentioned. Upon the grant of immunity, Friedland testified that in a report to Local 810 on March 3, 1967, he stated that authorizations for certain expenditures were not in the minute books. The pertinent portion of the report was marked as a court exhibit. This damaging evidence had not been previously revealed. Indeed Friedland had successfully moved to quash a grand jury subpoena duces tecum calling for the production of this report at the time of the grand jury investigation in the case.

The circumstances just set forth refute any charge of impermissible amendment of the indictment. The Govern-

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torney-client relationship for the purposes of its ruling. This was done as a matter of expediency because the trial was being unduly delayed by extended hearings *in camera* and the court proceeded to reach its grounds for the ruling quickly without being mired down by what would have been a fruitless exploration of Friedland's testimony that he represented Silverman as well as the unions. The grounds of decision reached by the trial court were expressly approved by the Court of Appeals. See, United States v. Silverman, supra, at pp. 120-122. They were the lack of confidentiality of the minutes, which were public records of the union (29 U.S.C. §§ 431 (c), 436 (1964): and further the conclusion that the privilege was being used to frustrate the Government's attempt to prove that the minute books had been tampered with, thereby perpetrating to a fraud upon the court. Additionally, the trial court was not compelled to deal with Friedland's claim but also with the contemporaneous claim of privelige by David Shivitz, another attorney, who had possession of the report. His position was hostile to the Government. He represented Local 810 and testified for the defense as a character witness. Shivitz surrendered the report to the court only after a flat direction to do so and *in camera* hearing which consumed over 100 pages of the trial transcript.

ment's case in chief rested upon different proof of false [5] entries in the books and records of the unions—the testimony of an expert witness with respect to the typing on the fabricated minute book pages; and the mislabeling of items of expenditure in the books of account purporting to cover printing and alleged Christmas gratuities. This proof was entirely consonant with the two year time period specified in the indictment and would have substantiated, without more, the charges set forth in count eighteen.

Additionally, since the alteration of the minutes was to fabricate an apparent approval for a loan to Silverman and authorization for the so-called Christmas gratuities, the inference that Silverman was responsible for the alteration was clearly admissible on the issue of his intent. *Wigmore, Evidence*, §§ 276(4), 278(2) (3d ed. 1940); *Samuels* v. *United States*, 397 F.2d 31 (10th Cir. 1968). That it happened also to be proof of one of the unlawful acts described in count eighteen did not make it any less relevant or material. *United States* v. *Jones*, 374 F.2d 414 (2d 414 (2d Cir. 1967), *cert. denied*, 389 U.S. 835; *United States* v. *Murphy*, 374 F.2d 651 (2d Cir. 1967), *cert. denied*, 389 U.S. 836.

Apart from what has been said, and accepting, *arguendo*, the petitioner's contention at face value, the courts have recognized two kinds of erroneous departures from the original indictment of a grand jury: (1) an amendment, whereby the charging terms are altered, literally or in effect, by the prosecutor or the court after the grand jury has last [6] passed upon them; and (2) a variance, whereby the charging terms are left unaltered but evidence offered at trial proves facts materially different from those alleged in the indictment. *Gaither* v. *United States*, 413 F.2d 1061 (D.C. Cir. 1969). This circuit has spoken of amendments "of substance" and amendments "of form"—the latter regarded as a variance only. See *United States* v. *Wolfson*, 437 F.2d 862, 872-873 (2d Cir. 1970).

The present motion can be denied merely upon the ground that proof of false entries made some nine weeks after the pleaded two-year time period constituted a variance and did not materially differ from the facts alleged in the indictment.

Other reasons also compel the denial of this motion. It is the accepted rule that a variance does not call for dismissal of the indictment except upon a showing of prejudice. *Berger* v. *United States*, 295 U.S. 78 (1935); *Gaither* v. *United States, supra* at 1072. Silverman has demonstrated no prejudice by the rebuttal testimony which revealed the March 3, 1967 date, the so-called variance in count eighteen. He was not taken by surprise, he did not object at trial and he did not request a continuance. Nor did he raise this question on his appeal when it should have been raised. *Castellana* v. *United States*, 378 F.2d 231 (2d Cir. 1967); *United States* v. *DeFillo*, 183 F. Supp. 782 (S.D.N.Y. 1959), *aff'd*, 277 F.2d [7] 162 (2d Cir. 1960). And clearly Silverman's conviction was not based on theories and evidence not "fairly embraced in the charges made in the indictment." *Russell* v. *United States*, 369 U.S. 749, 793 (1962).

Finally, in testing the sufficiency of an indictment, the alleged date of the offense is not ordinarily considered a material allegation where time is not of the essence in connection with the crime charged. Within reasonable limits, proof of any date before the return of the indictment and withiin the statute of limitations is sufficient. *United States* v. *Edelman*, 414 F.2d 539 (2d Cir. 1969), *cert. denied*, 396 U.S. 1053. See, *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1124-1125 (E.D. La. 1970).

Motion denied. It is so ordered.

Dated: New York, N.Y.
March 21, 1972

EDMUND L. PALMIERI
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
v.
MILTON SILVERMAN,
Defendant.

68 CRIM. 762

Opinion of Palmieri, J.
June 22, 1971

[2] PALMIERI, J.

The defendant's motion, in the nature of a writ of error coram nobis, is for a new trial, or in the alternative for reconsideration of a previously denied motion for a new trial (Rule 33, F. R. Cr. P.), or in the alternative for a reduction of sentence (Rule 35, F. R. Cr. P.).

For the reasons hereinafter set forth, the motions are denied in all respects.

The defendant was convicted after a nine day jury trial of sixteen counts of an indictment charging him with embezzlement of union funds and the falsification of union books and records at times when he occupied important positions with the unions involved and when he dominated the unions and their affairs.

The conviction of Silverman was affirmed with respect to eight counts and reversed with respect to eight counts. *United States* v. *Silverman*, 430 F.2d 106 (2d Cir. 1970). The result of this disposition was to leave the eight months' prison sentence unimpaired, but to reduce the total fines from $16,000 to $8,000. Certiorari was denied by the Supreme Court on May 3, 1971. (39 U.S.L.W. 3487, No. 1334). After unsuccessful attempts to secure stays from the Court of Appeals and this court, Silverman began service of his sentence on June 8, 1971.

THE MOTION FOR RECONSIDERATION OF THE FORMER NEW TRIAL MOTION

[3] This motion was the subject of extensive consideration by this court and its denial was expressly affirmed by the Court of Appeals. See *United States* v. *Silverman, supra* at pp. 119-120. No reason is presently advanced for requiring a reexamination of this motion and the court is unable to perceive any. The motion for reconsideration must accordingly be denied.

THE NEW TRIAL MOTION

The present motion for a new trial is based upon the reversal of the Court of Appeals of the first eight counts dealing with the use of union funds for political contributions. The issue which divided the appellate court had nothing to do with insufficient or prejudicial evidence. It concerned the proper construction of 29 U.S.C. § 501(c)—whether what Silverman did was sufficient as a matter of law to constitute theft or embezzlement of the unions' assets. There was no issue at the trial concerning the legality of the unions' contributions for political purposes and the jury was so charged. See *United States* v. *Silverman, supra* at p. 113. This court cannot agree that the trial was [4] "marred" in any way by the proof with respect to these counts. Nor can it agree that there was a "brooding omnipresence of the violation of the income tax laws." There was no allusion whatever by the court or the prosecutor to possible tax violations at any time before the jury. The matter was injected into the case by the defense. As the Court of Appeals said in *United States* v. *Silverman, supra* at pp. 122-123:

> "... Some of the evidence objected to on appeal was introduced by the defendant himself as part of his trial strategy. For example, in explanation of the false itemizations on the Scoop Printing bills, the defense sought to show that corporations wanted their non-deductible political contributions converted into deductible busi-

> ness expenses. Now, it claims that the evidence has no rational connection to the crime charged. . . ."

And it is clear from the opinion of the Court of Appeals that the false reporting and false records counts were properly proved, at least in part, by the false description of the political contributions. The claims here raised by Silverman are substantially similar to those raised by him unsuccessfully before the Court of Appeals. The decision in *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970) bears no relationship to this case either on the facts or the applicable law.

THE MOTION FOR REDUCTION OF SENTENCE

[5] With respect to the motion for reduction of sentence, there is no persuasive basis upon which it can be granted. Silverman's culpability was not attenuated in the slightest degree by the view the majority adopted with respect to the construction of 29 U.S.C. § 501(c) already referred to. This court was provided with a presentence report and after considering every factor favorable to the defendant imposed what is believed to be a considerate sentence.

Motion denied. It is so ordered.

Dated: New York, N.Y.
June 22, 1971

/s/ EDMUND L. PALMIERI
U. S. D. J.